BEFORE THE APPEALS BOARD FOR THE KANSAS DIVISION OF WORKERS COMPENSATION

| TIMOTHY E. RALL |) | |
|-------------------------|---|----------------------|
| Claimant |) | |
| VS. |) | |
| |) | Docket No. 1,030,539 |
| RED COACH INN |) | |
| Respondent |) | |
| AND |) | |
| |) | |
| FIRSTCOMP INSURANCE CO. |) | |
| Insurance Carrier |) | |

ORDER

Respondent and its insurance carrier appealed the October 4, 2006, Order entered by Administrative Law Judge Bruce E. Moore.

ISSUES

Claimant alleges he injured his left knee on August 3, 2006, while working for respondent. Following an October 2006 preliminary hearing, Judge Moore awarded claimant both temporary total disability benefits and medical benefits. The Judge reasoned:

THE COURT: Well, this is my situation. Claimant's testimony about how he suffered his injury is really not contested. The respondent would inject uncertainty in the picture over the date of accident, and it is difficult from my review of the medical records and claimant's testimony to reconcile claimant's testimony that, in fact, this happened on August 3rd rather than August 4 because of numerous references throughout the medical records to an August 4 accident.

From the evidence and testimony presented thus far, it does appear that claimant suffered an injury at work on or about August 4 of 2006. I don't recall claimant testifying as to the time of day during which this injury would have occurred, whether it was before or after noon, and frankly, the issue isn't before me. It does appear from the totality of the evidence presented that claimant suffered an injury at work on or about August 4 of 2006, that respondent had notice of that claim within 10 days. There's certainly dispute between claimant and Mr. Bhakta as to the extent to which that injury was discussed. At this point, I'm just going to resolve that in

claimant's favor, although it's certainly subject to review and reconsideration with additional evidence.¹

Respondent and its insurance carrier contend Judge Moore erred. They argue claimant's testimony is not credible in light of the medical records introduced at the preliminary hearing and the testimony of respondent's Shamir Bhakta. They contend claimant filed this workers compensation claim in retaliation for his termination. Accordingly, respondent and its insurance carrier argue claimant has failed to prove he injured his left knee at work and failed to prove he provided respondent with timely notice of the alleged accident. In short, they request the Board to deny claimant's request for preliminary hearing benefits.

Conversely, claimant contends the preliminary hearing Order should be affirmed.

The only issues on this appeal are:

- 1. Did claimant injure his left knee while working for respondent in an accident that arose out of and in the course of his employment with respondent?
- 2. If so, did claimant provide respondent with timely notice of that accident or injury?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes the preliminary hearing Order should be affirmed.

Claimant began working for respondent, which operates a motel in Salina, Kansas, in July 2006. Claimant's primary job was preparing the breakfast buffet that respondent provided for its customers.

Claimant testified that he twisted his left knee on either Thursday, August 3 or Friday, August 4, 2006, when he was putting away food that had been recently delivered. Claimant's confusion regarding the exact date of accident arises from being unable to remember whether the food was regularly delivered on Wednesdays or Thursdays and being unable to remember whether he was putting the food away on the day it arrived or the following day. In any event, claimant described the incident as follows:

He had bought several boxes of hams, fully cooked hams, for some kind of banquet or something, I think. I was in the walk-ins, and the walk-ins, they have a

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¹ P.H. Trans. at 67, 68.

condensation problem. There's water on the floor and I grabbed one of the boxes to twist and put it on the shelf, and I twisted my knee, bad. Not bad enough where I went down. I went ahead and worked out the rest of the shift, but I knew right then that I had done something.²

Claimant did not report the incident to respondent on the day it occurred. Claimant believes he twisted his knee on Thursday, August 3, 2006, but worked the following day. There is no question, however, that he sought medical treatment at the Salina Regional Health Center emergency room on Saturday, August 5, 2006.

According to the emergency room records introduced at the preliminary hearing, claimant sought treatment on August 5, 2006. Moreover, those records set forth a history that claimant injured his left knee the day before when he slipped on a wet floor while at work at respondent's motel.

The medical records also contain another description of the alleged accident. On August 15, 2006, claimant saw a physician at the Orthopaedic Clinic of Salina, who recorded a history that on August 4, 2006, claimant was walking into a locker doing a lot of unloading of food when he twisted his left knee.

Claimant contends he told respondent's general manager, Shamir Bhakta, during an early Saturday morning telephone conversation before going to the emergency room that he had injured his knee at work. Claimant also testified that after leaving the emergency room he returned to the motel, where he resided with his wife, and he gave Mr. Bhakta the paperwork he had received from the emergency room. Mr. Bhakta allegedly gave claimant \$20 for medications. According to claimant, he was then terminated as Mr. Bhakta announced he was "shutting the kitchen down."

Mr. Bhakta remembers the events quite differently. Mr. Bhakta testified he fired claimant on Friday night, August 4, 2006, after claimant and a customer confronted one another. Mr. Bhakta denies claimant reported he had injured his knee at work on the Saturday in question. But Mr. Bhakta did testify that around August 8 or 10, 2006, he learned that claimant was claiming a work-related injury when he received some emergency room bills or forms in the mail.⁴ Mr. Bhakta admits speaking with claimant after claimant returned to the motel with his left leg in a brace following his emergency room visit. But, according to Mr. Bhakta, he did not ask claimant about his knee and claimant neither related

² *Id.* at 15, 16.

³ *Id.* at 19.

⁴ *Id.* at 47, 48.

the knee to his work nor presented any paperwork. Mr. Bhakta also denies giving claimant \$20 for medication.

Despite the conflicting testimony, Judge Moore granted claimant's request for preliminary hearing benefits. This Board Member agrees. First, there is really no dispute that claimant provided respondent with timely notice as Mr. Bhakta indicated he received notice of a work-related injury by August 8 or 10, 2006, which, excluding weekends, is well within the 10 days required by the Workers Compensation Act.⁵ Second, the medical records are consistent that claimant reported he injured his knee at work. Although the descriptions of the incident in the medical records are somewhat different, those differences are not sufficient to cause this Board Member to disbelieve claimant's testimony, which the Judge implicitly found to be credible.

In short, for preliminary hearing purposes, claimant has established that he injured his left knee in an accident that arose out of and in the course of his employment with respondent and that he provided respondent with timely notice of that injury. The preliminary hearing Order should be affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the October 4, 2006, Order entered by Judge Moore is affirmed.

| IT IS SO ORDERED. |
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| Dated this day of December, 2006. |
| BOARD MEMBER |

c: Scott M. Price, Attorney for Claimant Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier Bruce E. Moore, Administrative Law Judge

⁵ See K.S.A. 44-520.

⁶ K.S.A. 44-534a.